IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN.,

Appellant,

vs. **Case Number SC09-2018**

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR THE FOURTH JUDICIAL CIRCUIT,
DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
FLORIDA BAR NUMBER 0899641
LAW OFFICE OF TODD G. SCHER, P.L.
5600 COLLINS AVENUE #15-B
MIAMI BEACH, FLORIDA 33140
(305) 861-9252
COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Mr. Mungin appeals the circuit court's summary denial of relief on his Rule 3.851 motion.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page numbers following the abbreviations:

"R.___." -Record on direct appeal to this Court;

"PCR__." -Record in first postconviction appeal;

"Supp. PCR.___" -Supplemental Record in first postconviction appeal;

"2PCR ___" -Record in instant second postconviction appeal.

REQUEST FOR ORAL ARGUMENT

Mr. Mungin, through counsel, respectfully requests that the Court permit oral argument.

TABLE OF CONTENTS

II

TABLE OF AUTHORITIES

PROCEDURAL HISTORY

Mr. Mungin was charged by indictment filed March 26, 1992, with the 1990 first-degree murder of Betty Jean Woods in Jacksonville, Florida (R1). The guilt phase was conducted from January 25, 1993, through January 28, 1993, and resulted in a verdict of guilty of first-degree murder (R342; T1057). The penalty phase was held on February 2, 1993, after which the jury recommended the death penalty by a vote of seven (7) to five (5) (R382; T1256). On February 23, 1993, Judge John D. Southwood sentenced Mr. Mungin to death (R401; T1291). The trial court followed the jury recommendation, finding the existence of two (2) aggravating circumstances, no statutory mitigation and minimal weight to the nonstatutory mitigation that Mr. Mungin could be rehabilitated and did not have an antisocial personality. This Court affirmed on direct appeal over the dissent of Justice Anstead. *Mungin v. State*, 689 So. 2d 1026 (Fla. 1995), *cert. denied*, 522 U.S. 833 (1997) [hereinafter *Mungin I*].

On September 17, 1998, the CCRC-North office filed a Rule 3.850 motion on behalf of Mr. Mungin (Supp. PCR3-44).[1] On January 12, 1999, the Chief

[1] 1On September 1, 1998, the Chief Judge in the Fourth Judicial Circuit entered an order appointing attorney Mark E. Olive to represent Mr. Mungin pursuant to the capital attorney registry (Supp. PCR1-2). However, CCRC-North filed the Rule 3.850 on behalf of Mr. Mungin in order to protect his rights under

Judge of the Fourth Judicial Circuit appointed Senior Judge John D. Southwood to preside over Mr. Mungin's postconviction proceedings since he had presided over the case at trial (Supp. PCR45).

A status hearing was subsequently scheduled for December 14, 1999 (Supp. PCR88. At that hearing, one of the issues discussed was whether Mr. Henderson could continue to represent Mr. Mungin due to personal and other work-related commitments (Supp. PCR384). On December 21, 1999, Mr. Mungin, *pro se*, filed a motion requesting the court remove Mr. Henderson from representing him given Mr. Henderson's own request at the December 14 that another attorney be appointed (Supp. PCR90-96). On February 3, 2000, Mr. Henderson formally moved to withdraw (Supp. PCR114), and on February 10, 2000, the motion was granted and attorney Dale Westling was next appointed as registry counsel (Supp. PCR114; 117).

On July 12, 2000, another status conference was conducted (Supp. PCR119), following which time the court granted Mr. Mungin and new counsel

---

the chaotic situation regarding the funding of the CCRC offices at the time and the recent enactment of the attorney registry. In March, 1999, the Chief Judge issued an order revoking Mr. Olive's appointment due to Mr. Olive's position regarding the registry contract, *see Olive v. Maas*, 811 So. 2d 644 (Fla. 2002), and appointed Wayne F. Henderson, Esq., to represent Mr. Mungin (Supp. PCR54-55).

until August 31, 2000, in which to file an amended 3.850 motion (Supp. PCR121). On August 16, 2000, Mr. Mungin's counsel sought a further extension to September 30, 2000, in which to file the amended motion as new information had recently surfaced with warranted investigation (Supp. PCR123); the State did not object to the request (Supp. PCR124). An order granting the extension was subsequently entered (Supp. PCR125), and on September 14, 2000, a twenty-four page amended motion was filed (Supp. PCR163-185).[2] The State's response was filed on October 27, 2000, in which the State did not oppose an evidentiary hearing (Supp. PCR188-196).

The court then set a hearing pursuant to *Huff v. State*, 622 So. 2d 982 (Fla. 1993), to take place on January 18, 2001 (Supp. PCR197). A pre-hearing conference was also set for March 7, 2001 (Supp. PCR199). During this time period, additional problems surrounding the attorney-client relationship arose between Mr. Mungin and Mr. Westling, culminating in a renewed motion by Mr. Mungin to remove Mr. Westling (Supp. PCR203-212). On March 1, 2001, Mr. Westling ultimately moved to withdraw due to irreconcilable differences (Supp.

---

[2] 2In a *pro se* motion dated August 24, 2000, Mr. Mungin sought the removal of Mr. Westling based on Mr. Westling's failure to adequately communicate and investigate the case (Supp. PCR129-156). The court ultimately denied this request (Supp. PCR159-60).

PCR268), and Mr. Mungin moved for the appointment of new counsel (Supp. PCR269-70). Following a hearing, the court entered an order granting Mr. Westling's motion to withdraw and accepting the appearance of attorney Kenneth Malnik, who had been privately retained by Mr. Mungin (Supp. PCR277-78; 280). Mr. Mungin thereafter filed a consolidated amended Rule 3.850 motion, containing seventeen (17) numbered claims for relief (PCR1-76). The State filed a response to this motion (PCR79-105).[3]

A *Huff* hearing was held on March 8, 2002 (Supp. PCR400-449), after which the court granted an evidentiary hearing on two claims (Claims I and IV),[4] and summarily denied the remaining claims (PCR108-09).[5] On June 24, 2003, Mr. Mungin filed two supplemental claims to his consolidated Rule 3.850 motion,

---

[3] 3Mr. Malnik represented Mr. Mungin throughout the remainder of his state Rule 3.850 proceedings and through the early stages of his appeal to the Florida Supreme Court. The undersigned attorney was subsequently retained to substitute for Mr. Malnik in the Florida Supreme Court appeal proceedings.

[4] 4Claim I addressed allegations of trial counsel's ineffectiveness at the guilt phase , conflict of interest, and newly discovered evidence (PCR3; 108); Claim IV alleged ineffective assistance of counsel during the penalty phase due to counsel's failure to present certain mitigating evidence (PCR33;108).

[5] 5Claim XIV, alleging judicial bias, was withdrawn at the *Huff* hearing (Supp. PCR438-39). Rulings on Claims VII and XVI, which alleged cumulative error, were, at the State's request, deferred until after the conclusion of the evidentiary hearing (Supp. PCR405).

one alleging a *Brady* violation,[6] and the other raising a Sixth Amendment violation in light of *Ring v. Arizona*, 536 U.S. 584 (2002) (PCR110-11). The trial court refused to entertain the *Brady* claim (PCR227-29); as to the *Ring* claim, the lower court indicated that it would not address it until the parties had "benefit of more information" from the United States Supreme Court and the Florida Supreme Court (PCR229-30). The evidentiary hearing was conducted by the lower court on June 25 and 26, 2002. Following the evidentiary hearing, post-hearing memoranda were submitted by the parties (PCR116-151; 152-73; 175-79). Relief was denied by order entered signed on March 18, 2003, and filed with the clerk on March 21, 2003 (PCR203-09). Timely notice of appeal was entered to this Court (PCR210-11).

Following briefing and oral argument, this Court affirmed the denial of Rule 3.850 relief, and also denied Mr. Mungin's petition for state habeas corpus relief. *Mungin v. State*, 932 So. 2d 986 (Fla. 2006) [hereinafter *Mungin II*]. A timely motion for rehearing was filed and denied on June 13, 2006, and mandate issued by this Court on June 29, 2006.

Mr. Mungin thereafter filed a timely petition for a writ of habeas corpus

---

[6] 6*Brady v. Maryland*, 373 U.S. 83 (1963).

pursuant to 28 U.S.C. §2254. While that petition was pending, Mr. Mungin filed a new Rule 3.851 motion in the circuit court in and for Duval County, Florida (2PCR1-75). The motion, raising two claims, contained supporting documentation in the form of two affidavits, one from witness George Brown and the other from Mr. Mungin's trial counsel, Judge Charles C. Cofer (2PCR70-72) (Brown affidavit); 74-75 (Cofer affidavit), and a police report relevant to the issues presented in the new Rule 3.851 motion (2PCR73).[7] The State moved to

[7]In Claim I, Mr. Mungin alleged that he was denied an adequate adversarial testing at the guilt and penalty phases of his capital trial in light of newly-discovered evidence of constitutional violations as evidenced in an affidavit by George Brown (2PCR6 *et seq.*). Specifically, Mr. Mungin alleged that the information contained in Brown's affidavit was evidence that was exculpatory and was improperly withheld from the defense by the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1968). He further alleged that the information contained in Brown's affidavit established that the State knowingly presented false testimony at Mr. Mungin's trial, in violation of due process and *Giglio v. United States*, 405 U.S. 150 (1972). Mr. Mungin also alleged that the information contained in Brown's affidavit qualified of newly discovered evidence under *Jones v. State*, 591 So. 2d 911 (Fla. 1991), and that the court was required to assess this newly discovered evidence in light of its cumulative impact on the adequacy of the verdict and sentence (2PCR98-99). Finally, Mr. Mungin alleged that if the State, in the face of explicit Supreme Court law, would argue that trial counsel was not diligent in discovering the information in question, then Mr. Mungin received ineffective assistance of counsel due to the lack of adequate investigation, in violation of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). In Claim I, Mr. Mungin also asserted his entitlement to an evidentiary hearing (2PCR100). In Claim II, Mr. Mungin alleged constitutional violations with regard to the existing procedures for carrying out executions by lethal injection in Florida (2PCR101-102).

strike the motion because it exceeded the page limitations set forth in Fla. R. Crim. P. 3.851(e)(2), and, after the lower court granted that motion, Mr. Mungin filed a corrected motion to comply with the page limitations (2PCR79-102). The State filed a written response in which it did not agree to the necessity for an evidentiary hearing (2PCR104-110).

On August 12, 2009, a case management hearing took place before the lower court judge. In support of relief as to Claim I, Mr. Mungin's counsel contended that this claim "requires some factual development" at an evidentiary hearing because the claim was grounded on the affidavits of George Brown and trial counsel Judge Charles Cofer, particularly given Mr. Mungin's allegations and Cofer's sworn statement that "the information contained in Mr. Brown's affidavit was never disclosed to Mr. Mungin either prior to trial or even during his first 3.851 proceedings" (T. Hearing 8/12/09 at 4). Mr. Mungin's counsel also reiterated that the information contained in Brown's affidavit established both a *Brady* and a *Giglio* violation and, additionally, constituted newly-discovered evidence (T. Hearing 8.12.09 at 4-5).

At the case management hearing, the State contended that Mr. Mungin has not established that "anything prevented [him] from being able to discover Mr. Brown and to make this claim at the first post-conviction" and that the new

information was "simply an impeachment of one of the state's witnesses," Ronald Kirkland, who, as the State acknowledged, was "the key witness" against Mr. Mungin at his trial (T. Hearing 8/12/09 at 9). The State also contended that no factual development was needed because even on the face of the motion, assuming the allegations to be true, did not undermine confidence in the result at trial (T. Hearing 8/12/09 at 10).

In response to the State's arguments, Mr. Mungin's counsel contended that his motion made allegations that the information was never previously disclosed, and that Judge Cofer's affidavit specifically stated that he had no reason to question to veracity of the police report in question, and that if the State wanted to dispose of the need for an evidentiary hearing, it needed to concede the issue of diligence, admit that the police filed a false police report in this case, and acknowledge that the State never disclosed the truth to the defense prior to trial (T. Hearing 8/12/09 at 12). Based on the new information, Mr. Mungin emphasized that

> we now have yet more information that Mr. Kirkland was a completely unreliable witness. I mean now we have information that the police reports were in fact false with respect to what Mr. Brown related to the police at the time and that this has been going on for – since 1992, and it wasn't until this point that this information was discovered, and of course under the *Banks* case which is discussed in the motion it's the state that has the burden to disclose. It's not the

> defense's obligation to hunt and pick, you know, over the years and just come across something by happenstance which is – which is – you know, that's just not permitted.
>
> So I submit we more than met the burden here to get an evidentiary hearing where we can present Your Honor with our witnesses.

(T. Hearing 8/12/09 at 12-13).

At the conclusion of the case management hearing, the lower court announced its intention to deny the motion without an evidentiary hearing:

> THE COURT: Okay. Let me point out something in the case law. This is something that I think is important in rendering my decision, and of course in many death penalty cases that a judge hearing these motions is not the trial judge as you probably know. I mean sometimes they are and sometimes they aren't, and in it says the judge hearing this particular motion must take everything in totality and I think it would be very difficult for someone who was not the trial judge to do that, although I suppose they can read transcripts.
>
> But it should be pointed out in this case I was the trial judge in this particular case so I have a very vivid recollection of the trial and the facts in the case and everything else.
>
> In considering that it's my feeling that those matters set forth in the motion do not rise to the standard which is required for newly discovered evidence to grant any relief whatsoever because the evidence, physical evidence and otherwise was very overwhelming as far as I am concerned in order to convict Mr. Mungin with or without these matters that are set forth with regard to Kirkland and others, so I am going to deny the motion but I am not technically denying it until I ask the State to propose an order within 15 days.

(T. Hearing 8/12/09 at 14). Following this ruling, the lower court made it clear to

the State that the proposed order should reflect "basically some of the matters I have just talked about" (*Id*. at 15). When Mr. Mungin's counsel lodged an objection to the State providing a proposed order, he noted that if this was going to be the process, then "the order [should] only reflect matters that the Court discussed at the hearing and the State not add anything" (*Id*. at 16). The Court stated "[t]hat's correct" (*Id*.).

Despite counsel's stated concerns and the lower court's own statement that any proposed order should reflect exactly what the court's ruling was, the State drafted a 12-page document that far exceeded the lower court's one-paragraph oral denial (2PCR111-121). Mr. Mungin filed written objections to the State's proposed order, and requested that any Order entered by the court reflect only what the court actually ruled at the August 12 hearing, no more and no less (2PCR123-129). For example, Mr. Mungin lodged the following objections to the State's proposed order:

•Mr. Mungin objected to the State's language that, at the August 12 hearing, the Court "explained the procedural and substantive grounds for the denial."[8]

[8]In footnote 3, the State referred to the lower court's oral ruling "announced May 11, 2009" (2PCR 114 n.3). The hearing was not on May 11, 2009, but rather on August 12, 2009.

The lourt made no rulings as to any alleged "procedural" grounds that formed the basis of the court's denial. The court's denial, as set forth above and in the transcript of the hearing, was clear. The court denied the motion on substantive grounds (that is, on the merits), as opposed to any putative "procedural grounds."[9]

•Aside from the incorrect assertion that the lower court denied Mr. Mungin's motion on any "procedural grounds," the State, in its proposed order, put its own version of events into the proposed order, completely ignoring the court's own stated basis for its ruling. For example, the State, beginning on page 5 when discussing the claim raised pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), discusses that there "appear to be" three differences between what Mr. Brown alleges in his affidavit and what the arrest report indicates that Brown told the officer (2PCR 115). The lower court made no such observations, nor did the State even argue such "differences" at the case management hearing.[10] Moreover, the State's present attempt to somehow cast doubt on Mr. Brown's credibility

[9]Ultimately, the lower court denied this claim on its merits as conclusively refuted by the record.

[10]This is precisely what Mr. Mungin feared when the lower court requested the State submit a proposed order, that the State would add information never even discussed at the hearing, much less information that never formed the basis of the court's ruling. These alleged "differences" in the Brown affidavit were never even discussed in the State's 6-page response to Mr. Mungin's Rule 3.851 motion.

stands in stark contrast to the long-settled principle that Mr. Mungin's allegations must be accepted as true at this juncture or an evidentiary hearing must be ordered; indeed, at the case management hearing, the State agreed with this principle (Transcript at 10) (". . . the thing is is he is not entitled to relief on the face of the motion. He does not meet the standards for newly discovered evidence, doesn't meet the standards for Brady and for that matter doesn't meet the standards for ineffective assistance of counsel which was their alternative claim, so there's no hearing necessary. There is no factual development that needs to be made because the face of the motion itself, even taking Mr. Brown's testimony, Judge Cofer's testimony, all of their argument is true he's not entitled to relief so there is no reason for an evidentiary hearing on that basis").

•The State addressed the materiality prong of *Brady*, writing that the "allegedly withheld statements are not particularly material" and discussed this in more detail further in the paragraph (2PCR 116). Again, the State, in contrast to its position at the case management hearing, appears to be contesting that the information at issue was withheld by the State. The State cannot truly accept the allegations as true while including, in the proposed order, that the information in question was "allegedly withheld." If the State now wishes to contest the truthfulness of the allegations, then it must concede that an evidentiary hearing is

warranted. If it wishes to accept the allegations as true, then it must do so, and provide an accurate recitation of the court's ruling.

•The same objections were are made to the second full paragraph on page 6 of the proposed order. Although the court did state that its denial was based on the "overwhelming" nature of the evidence "without or without these matters that are set forth with regard to Kirkland and others" (T. Hearing 8/12/09 at 14), it did not get into such exacting detail as the State's proposed order reflects. While some of these matters were discussed at the hearing prior to the court's ruling, Mr. Mungin's counsel also argued that the evidence now set forth by the State "was subject to challenge" and that it was so challenged at trial or in the prior postconviction proceedings (T. Hearing 8/12/09 at 8).

•Likewise, the first full paragraph on page 7 of the proposed Order does not, in any fashion, reflect the lower court's ruling. The lower court never ruled that Brown's affidavit "does not allege that a person other than Defendant robbed and killed Ms. Woods, or that Defendant could not have been the killer" (Proposed Order at 7). This fact was never even discussed at the case management hearing, nor was it mentioned in the State's response to the Rule 3.851 motion. Thus, it could hardly be deemed to have formed a basis of the lower court's denial when it was never even discussed by the parties at the hearing, much less stated by the

lower court as forming the basis for its ruling.

Notwithstanding Mr. Mungin's objections, the lower court signed the State's proposed order and the order was filed on October 8, 2009) (2PCR130-140). A timely notice of appeal was filed, and this Brief follows.

STATEMENT OF THE FACTS FROM TRIAL

THE GUILT PHASE

Because a proper evaluation of Mr. Mungin's claims require an assessment of the evidence adduced at trial and at the state court evidentiary hearing, Mr. Mungin provides below a summary of the relevant evidence from trial. In the Argument section of this Brief, Mr. Mungin will address some of the evidence adduced at the prior evidentiary hearing in order to provide context for the requisite cumulative analysis.

On Sunday, September 16, 1990, between 1:30 and 2:00 PM, Ronald Kirkland stopped at the Lil' Champ store on Chaffee Road near Interstate 10, in Jacksonville (T663-64). There was a tan or cream colored compact car parked in the lot (T676). As Kirkland went in, a black man coming out of the store carrying a brown bag almost knocked him over (T664, 671). Kirkland got a brief glimpse at the man as they passed; then, because he was angry at being bumped, Kirkland turned and saw the back of the man's head (T677-78). The man coming out of the store had longish-hair done up in a "jeri curl," and had a growth of beard (T680-81). The beard could have been a couple of weeks old, but Kirkland could not give any estimate as to how old the growth appeared (T681).

Kirkland did not see anyone in the store; he got a diet coke and waited for the clerk to return (T664). A few minutes later, Kirkland noticed a woman lying on the floor behind the counter, near an open cash register (T664-65, 667). He removed two undissolved aspirins from the woman's mouth and attempted CPR; the woman started to cough blood, and Kirkland turner her on her side and noticed a wound on her head (T665). Another customer came in and called 911 (T665). The other customer also looked at the open cash register (T681). Kirkland did not know if the other customer checked both cash registers in the store (T681-82). The woman, Betty Jean Woods, a store employee, was taken to a hospital (T652, 659, 689). She died four (4) days later of a gunshot wound to her head (T639,

661).

On September 16, 1990, the day he found Ms. Woods, Kirkland told a detective he was not sure he would be able to recognize the man who had come out of the store as he went in (T682). On September 20, 1990, however, the same detective showed Kirkland six (6) or seven (7) photographs; Kirkland narrowed the pictures down to three, then picked out a photograph of Anthony Mungin (T671-674, 683). In the photography, Mr. Mungin had short hair and no beard (Exhibit 7). The officer who showed Mr. Mungin's photograph to Kirkland did not testify at trial. Kirkland also identified Mr. Mungin in the courtroom at trial (T671).

An evidence technician lifted twenty-nine (29) latent fingerprints from the crime scene (T628-29). Most were from the door, but he also looked for fingerprints on the cash registers, the safe, and the counter-top (T628-29, 631). No prints were lifted from the safe (T629). No evidence was presented of any comparison of the latent prints obtained with Mr. Mungin's fingerprints. The evidence technician also observed a purse behind the counter in the Lil' Champ store (T630). He saw no indication that the purse had been gone through (T630-31). The technician testified that the scene had been contaminated before he arrived, and that various people had walked behind the counter (T625). A shell casing was found on the floor of the store (T621-22).

Dennis Elder, a Lil' Champ supervisor, arrived at the store at 2:15 or 2:30 PM the day of the shooting (T688-89). Police were there and Ms. Woods was being taken away by a Life Flight helicopter (T694). During a walk through the store with the police, Elder did not notice anything missing or out of place (T694).

Elder performed what he called a "cash count" (T689). This involved calculating from the cash register records the amounts taken to determine how much money was supposed to be in the store (T692093). Elder would then count the cash actually in the store and determine whether the store was over or short (T693). Elder determined that the store had $59.05 less than the register reading indicated should have been there (T694).

Elder testified that the locations in the store where cash is kept are the two cash registers, a safe, a box under one of the registers, and in clips (T690-92). The clips were to hold money customers would give to pre-pay for gas; there was a different clip for each of the four gas pumps (T691-92). After paying for gas, the clerk would give the customer change and put the pre-paid cash from the clip in the cash register, the cash box, or the safe (T691-92, 699-700).

On the day of the shooting, only one of the cash registers would have been

in use (T695). The register that was not in use was in a locked down, turned off, drawer open, drawer empty position (T696-97). The cash register that was used that day was also locked; when Elder opened it, he found approximately $57 in the drawer (T698-99). At some point, an "E" indicator was triggered on one of the cash registers (T703-04). The "E" indicates that someone has tried to open the cash register other than by entering the "amount tendered" (T704). Elder could not remember when the "E" indicator showed up (*Id*.).

When Elder looked, there was no money in the cash box under the register and there was no money in the clips (T705-06). He said he had no way of knowing whether when Ms. Woods was shot there was any money in the clips or in the cash box (T700). He acknowledged that a cash shortage caused by theft of money from the cash box or clips would cause a cash shortage in the amount of $59.05 only if a customer had pre-paid in that amount, which would be very odd, and he would not expect to find such an odd amount in the clips or cash box (T700-02, 706).

Elder also testified that company policy was never to have more than $50 out of the safe (T702). He said that whenever he had checked in the past, Ms. Woods had complied with that policy, and that if on the day of the shooting there had been $59.05 in the cash box, in addition to the $57 in the cash register, Ms. Woods would have been greatly over what the policy allowed (T702-03).

The medical examiner testified that Ms. Woods was shot one time, with the entrance wound above her left ear (T640, 642, Exhibit 5). The bullet traveled left to right and slightly front to back (T643). The bullet was recovered just underneath the scalp opposite the entrance wound (T643). The treating physician observed at the entrance wound a powder burn about one quarter to one half inch in diameter (T655-56). The medical examiner testified that powder burns are not present unless the shot is fired from a distance of eighteen inches or less (T649). Closer shots would cause a smaller area of powder burn (T649).

On September 18, 1990, Mr. Mungin was arrested at 614 Jim Cody Street in Kingsland, Georgia (T836-37). A search of the house at that address revealed, in a bedroom, a .25 caliber Raven semi-automatic pistol, bullets, and Mr. Mungin's Georgia identification card (T837-43).[11] The prosecution's firearms identification analyst determined that the bullet recovered from Ms. Woods had been fired from the pistol seized at 614 Jim Cody Street, and the shell casing recovered at the Lil' Champ store was ejected from the same gun (T880-85).

The State called a number of witnesses who were referred to by both parties as *Williams*-rule witnesses.[12] Before the first *Williams*-rule witness, the defense

requested a *Williams*-rule instruction (T707). The trial judge told the prosecutor he did not know what the witnesses would testify to (T708), and asked which of the purposes of the *Williams*-rule he should instruct on (T709). The judge pointed out he could instruct on more than one purpose (*Id*.). The prosecutor told the court to instruct on the issue of identity, and the judge asked the prosecutor if that was all he wanted (*Id*.). Before the first *Williams*-rule witness testified, the court instructed the jury that as to the next several witnesses, the evidence they received was to be considered only for the purpose of proving the identity of the defendant (T712-13). The *Williams*-rule evidence was as follows:

On September 14, 1990, two (2) days before the Jacksonville shooting, at approximately 10:30 AM, Mr. Mungin drove up in a dark Ford Escort to Bishop's County Store in Monticello, Florida, near Interstate 10, came in, and asked for some cigarettes (T714, 719). William Rudd, the clerk on duty, noticed that Mr. Mungin was a clean-shaven, clean-cut young man; he thought Mr. Mungin might have been in the Navy (T725). Mr. Mungin was wearing a cap, but Rudd could see that there were no curls hanging from underneath the cap (T726). When Rudd turned to get the cigarettes, Mr. Mungin shot him in the back (T719, 721). Rudd saw Mr. Mungin then get money from the cash box that was kept under the counter (T722). When Rudd regained consciousness, he found that the money in the cash register was also missing (T723). Mr. Mungin's fingerprint was found on the cash box (T781). The bullet was not removed from Rudd, but an expended shell was recovered in the store, and was determined to have come from the pistol that was seized at Jim Cody Road in Kingsland, Georgia (T734, 870, 884-85). Rudd testified at trial and made an identification of Mr. Mungin in the courtroom (T718-19).

The same day, September 14, 1990, at about 12:30 PM, at the Carriage Gate shopping center on Thomasville Road near Interstate 10 in Tallahassee, Florida, Thomas Barlow witnessed Meihua Wang Tsai screaming and pointing at a black male in a red hat getting into an old faded red Escort with a Georgia tag (T737-38). Barlow ran after the car and got the licence plate number, which he gave to police (T740). The driver was wearing a cap, but Barlow was able to see that the driver did not have longish "jeri curls" coming from underneath the cap; he testified that the driver's head was clean shaven in the back, or was cut close to the scalp (T742-43).

A bullet recovered from the head of Ms. Tsai was determined to have come from the gun that was seized at Jim Cody Road (T756-58, 884-85). Apparently one bullet had gone through Ms. Tsai's hand and hit her head, but did not cause

her to lose consciousness (T760-61). The bullet was removed with use of a local anaesthetic (T761). A spent shell recovered from the carpet of the Lotus Accents store at the Carriage Gate mall was determined to have been fired from the same gun (T748, 884-85). Mr. Mungin's fingerprint was found on a receipt in the Lotus Accents store (T750-52, 785).

Barlow was shown a photograph of a red Ford Escort that was stolen from the Kings Lodge in Kingsland, Georgia, on September 13, 1990, and recovered, stripped of its tires, in Jacksonville, Florida, on September 18, 1990; Barlow identified the car as the one he saw being driven away from the Carriage Gate shopping center (T739, 795-98, 820-23). Kings Lodge, from where the Escort was stolen, is about a mile from Jim Cody Road, where Mr. Mungin was arrested (T836).

In Jacksonville, about a mile from where the Escort was recovered, a four-door Dodge Monaco Royal, a big car, white with a tan vinyl roof, was stolen on September 15 or 16, 1990 (T799, 802-03, 806). The Dodge was recovered in September 18 near Kingsland, Georgia, about seventy-five (75) to one-hundred (100) yards from the house where Mr. Mungin was arrested (T826, 828). Two (2) expended shells found in the Dodge were determined to have been used in the gun that shot Ms. Woods (T828, 853, 884-85).

At the conclusion of the *Williams*-rule witnesses, the trial court instructed the jurors again that such evidence was to be considered only as proof of the identity of the defendant (T829).[13]

At the close of the State's case, the defense moved for judgment of acquittal as to premeditated murder based on insufficiency of evidence of premeditation, and for judgment of acquittal as to felony murder based on insufficiency of evidence of the underlying felony of robbery (T901-05). Both motions were denied (T907). The judge instructed the jury on both premeditated murder (T1033-34), and felony murder, with robbery or attempted robbery as the underlying felony (T1034-37). The jury returned a general verdict of guilty of first-degree murder (R324; T1057).

However, on direct appeal, this Court concluded that the evidence did not support a finding of premeditated first-degree murder and thus held that "it was error to instruct the jury on both premeditated and felony murder." *Mungin v. State*, 689 So. 2d 1026, 1029-30 (Fla. 1995).[14] Notwithstanding the error, the Court, over the dissent of Justice Anstead, concluded that there was no reasonable possibility that the erroneous instruction contributed to Mr. Mungin's conviction and thus the error was harmless. *Id*. at 1030.[15]

SUMMARY OF THE ARGUMENTS

1. The lower court erred in summarily denying Mr. Mungin's Rule 3.851 motion. Mr. Mungin alleged more than sufficient facts establishing that numerous constitutional violations occurred at his capital trial and sentencing phase, including newly discovered violations of *Brady* and *Giglio* violations. The information discovered by Mr. Mungin also constitutes newly-discovered evidence warranting a new trial. Cumulative consideration of all of the evidence that the jury did not hear is warranted under these circumstances, including the substantial evidence presented by Mr. Mungin during his first Rule 3.851

---

[11] 7The identification card, Exhibit 15 at trial, indicated that Mr. Mungin's age at the time was twenty-four (24).

[12]*See Williams v. State*, 117 So. 2d 473 (Fla. 1960).

[13] 9The firearms identification expert's testimony came after the conclusion of the collateral crimes evidence, and was not explicitly subject to the limiting instruction, although some of the expert's testimony related to the collateral crimes.

[14]During the August 12, 2009, case management hearing, the lower court judge, who also presided over Mr. Mungin's trial, expressed that he was "astounded" at this Court's conclusion that he had committed instructional error (T. Hearing 8/12/09 at 6).

[15]Justice Anstead would have granted Mr. Mungin a new trial based on the Court's conclusion that the evidence was insufficient to sustain a finding of premeditation. *Mungin*, 689 So. 2d at 1031 (Anstead, J., dissenting).

proceedings. At a minimum, an evidentiary hearing is warranted, and the lower court's order summarily denying this motion should be reversed.

2. Florida's lethal injection procedures violate the Eighth Amendment to the United States Constitution. Mr. Mungin acknowledges that the Court has rejected similar claims in the past, and this claim is presented herein for purposes of preservation should unforeseen circumstances require that this claim be re-litigated.

I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. MUNGIN'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT HIS CAPITAL TRIAL DUE TO THE SINGULAR AND COMBINED EFFECTS OF VARIOUS CONSTITUTIONAL VIOLATIONS, INCLUDING VIOLATIONS OF *BRADY V. MARYLAND, GIGLIO V. UNITED STATES, STRICKLAND V. WASHINGTON,* AND THE DISCOVERY OF NEWLY DISCOVERED EVIDENCE. CUMULATIVE CONSIDERATION OF ALL PREVIOUS INFORMATION IS WARRANTED, AND REVERSAL FOR AN EVIDENTIARY HEARING IS CLEARLY WARRANTED.

A. Introduction.

By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. *See generally Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Holmes v. South Carolina*, 126 S. Ct. 1727 (2006). In Mr. Mungin's case, the prosecution, he acknowledges, presented ballistics evidence against him, as well as evidence of collateral crimes. However, due to the evidence presented below, it is now known that the State withheld material exculpatory evidence and knowingly presented false evidence. In light of this newly discovered evidence, when evaluated cumulatively with the information that the jury never knew due to the ineffectiveness of trial counsel, Mr. Mungin was never provided the opportunity to subject the State's case to the crucible of an adversarial testing.

As this Court recently wrote, Supreme Court case law and law from this Court are "based on the principle that society's search for the truth is the polestar that guides all judicial inquiry, and when the State knowingly presents false testimony or misleading argument to the court, the State casts an impenetrable cloud over that polestar." *Johnson v. State*, 2010 WL 121248 at *1 (Fla. Jan. 14,

2010). "[W]henever the State seeks to obfuscate the truth-seeking function of a court by knowingly using false testimony or misleading argument, the integrity of the judicial proceeding in placed in jeopardy." *Id*. (footnote omitted). "In our system of justice, ends do not justify means. Rather, experience teaches that the means become the end and that irregular and untruthful arguments lead to unreliable results." *Id*. at *19. Mr. Mungin maintains his absolute innocence of the murder of Ms. Woods, implores this Court to carefully review the record and the arguments set forth herein, and respectfully submits that a new trial be ordered. At a minimum, under this Court's precedent, an evidentiary hearing must be conducted due to the factual allegations presented below.

B. Standards for Evaluating Summary Denial of Rule 3.851 Motions.

Case law has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" *Lemon v. State*, 498 So. 2d 923 (Fla. 1986)(quoting Fla. R. Crim. P. 3.850). "Under Rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin*

v. State, 737 So. 2d 509, 516 (Fla. 1999). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996).

The same standard applies to successive motions to vacate under Rule 3.850/3.851. *Lightborne v. State*, 742 So. 2d 238, 249 (Fla. 1999) (remanding for an evidentiary hearing to evaluate reliability and veracity of factual allegations impeaching trial testimony); *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996) (remanding for evidentiary hearing to determine if evidence would probably produce an acquittal at retrial); *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996) (remanding for evidentiary hearing because of trial witness's claim that she was pressured by State and received undisclosed consideration for her false testimony); *Scott v. State*, 657 So. 2d 1129, 1132 (Fla. 1995) (lower court erred in failing to hold evidentiary hearing and remanding); *Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994) (remanding for evidentiary hearing to permits affiants to testify and allow defendant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"). Because the lower court denied relief without an evidentiary hearing, its "ruling was not based on any discrete factual findings to which this Court must defer" and thus *de novo*

review is required. *Johnson v. State*, 2010 WL 121248 at *12 (Fla. Jan. 14, 2010). Under the applicable legal standards as applied to the factual allegations described below, Mr. Mungin submits that he is entitled to an evidentiary hearing and that the lower court erred in summarily denying his motion.

C. Facts Underlying Mr. Mungin's Rule 3.851 Motion.

Without question, prosecution witness Ronald Kirkland was the linchpin of the State s case against Mr. Mungin.[16] Without a confession or physical evidence linking Mr. Mungin to the crime scene, Kirkland s identification of Mr. Mungin at the scene was unquestionably a critical piece of evidence for the prosecution. Moreover, Kirkland s testimony provided evidence supporting the State s theory of robbery; he was the only witness to testify that he saw Mr. Mungin leave the scene of the crime with a paper bag (R671). *Mungin I* at 1028 (There were no eyewitnesses to the shooting, but shortly after Woods was shot a customer entering the store passed a man leaving the store hurriedly with a paper bag. The customer, who found the injured clerk, identified the man as Mungin). Thus, any evidence tending to impeach Kirkland s credibility was critical to the jury s assessment of the State s case.

In his Rule 3.851 motion, Mr. Mungin sought relief from his unconstitutional convictions and sentences, including his sentence of death, based

on the information contained in the recently-executed affidavit from George Brown. In his sworn affidavit, Mr. Brown attests as follows:

AFFIDAVIT OF GEORGE BROWN

1. My name is George Brown, and my address and phone number are 8323 Grampbell Drive, Jacksonville, Florida, (904) 693-8939. I hereby state the following and will attest to same in any official proceeding.

2. On Sunday, September 16, 1990, at approximately 1355 hours, at the Little Champ Store on the corner of Chaffee Road and Crystal Springs Road, I was an eyewitness to the following events. I remember these event because I go past this location everyday since that date sixteen years ago.

3. I went into the store that day because it was hot outside. The lady was usually at the counter and was always there – she always made you feel that you were going to steal something – and she was always there. I went into the store and got a drink and went to the counter and she was not there. So, I waited there for a few minutes and then I thought something was wrong. I went to the bathroom and yelled for her and nothing happened. I went back up front and still she didn't come. At the end of the counter there was a door open, so I hollered in there and nothing happened and she didn't come. So, I looked down and there she was. I called 911.

4. There was no one in the store during this whole time. I was in there all alone. There was no one in the parking lot. There was no one at the gas pumps. There was no one out there. There was someone who came out of the store, brushed up against me when I was coming in but I could not tell who it was, whether the person was a male or female, white or black. I could never give a description of the person who was coming out of the store.

5. After I called 911, someone (a male) came into the store and asked what was happening. I was on the phone with 911 and told him that she was having a seizure and told him to roll her over on her side and then we heard this gurgling sound and the lady told us to roll her back on her back and we did.

6. The police officer came in at that time and he went over there and looked at her and decided to call the Life Flight. There was a cash drawer open on the register and the police officer told me that it was a Lottery drawer and it was always open. There was a glass of water next to the lady and a pill stuck to

her lip–that is why I thought she was having a seizure and fell down.

7. I never noticed that there was any type of struggle in the store.

8. The police officer took over the situation and he asked me who found the lady and I told him that I had. He was really busy getting the Life Flight together. The guy that came in took over and pretended that he had been there the whole time. The man was not there when I got there and he did not find the lady. I told the police officer that I could not describe or ever identify the person that brushed past me, I just did not pay attention. The other guy was so busy talking and acting like he was there. I told the police officer if they didn't need me any more, I was leaving.

9. There has never been any law enforcement officer, state attorney, investigator, defense lawyer, or anyone else come to talk with me since that day. I had no idea that anyone was identified or arrested or convicted for this crime.

10. I have reviewed a police report authored by K.D. Gilbreath, #5182, dated November 5, 1990, which contained statements purportedly made by me at the only time I was ever spoken to by anyone about this case. The version of events as stated in the report is false.

10. On page 7 of the 14-page report in the last paragraph, Mr. Kirkland did not go into the store first. There was no one in the store when I came in. Mr. Kirkland came into the store after I called 911. Mr. Kirkland did not find the victim–it was me. Mr. Kirkland says in the report that he saw a black guy coming out of the store. This is not true because when I went into the store, someone was coming out and I could not identify anyone and no one was in the store when I was there.

11. On page 8 of the report, in the first paragraph, I remember the detective talking to me, but like I have said, Mr. Kirkland stepped up and tried to take over. I told the detective that I checked all the bathrooms to see where she was, and I checked everywhere because she was always in the front. I went over to where the counter was and there was a door open in the back–a little storage room. I turned around and saw her there and heard gurgling noises and that is when I called 911.

12. I looked over and saw the drawer open but I did not touch anything. The officer is incorrect to report that I checked the drawer of the cash register and then shut the drawer. That never happened.

13. I did not know the victim had been shot because I thought she had had a seizure because of the pill stuck to her lip and the water that was spilled next to her.

14. I told the officer that I was the only one in the store and Mr. Kirkland did not come into the store until after I called 911. There is no way he saw anyone in the store because the person who brushed by me I could not identify, so there is no way that Mr. Kirkland could identify anyone, he was not in the store. I could not tell you what the person looked like and I was standing in the store a long time trying to find the lady.

15. I have always been available to testify at any proceedings and I am willing to testify as to what I observed on that particular day and to the falsehoods stated in the police report.

Under penalties of perjury, I declare that I have read the foregoing statement and that the facts stated in it are true.

(2PCR 70-72).[17]

The information contained in Mr. Brown's affidavit is evidence that unquestionably is exculpatory in nature and was improperly withheld by the State in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Moreover, the information contained in Mr. Brown's affidavit establishes that the State, at Mr. Mungin's trial, knowingly presented false evidence, in violation of due process and *Giglio v. United States*, 405 U.S. 150 (1972), and its progeny. Because the State has the ultimate duty to disclose exculpatory evidence to the defense, and the existence of this evidence was not previously disclosed by the State, and was only discovered recently through the efforts of Mr. Mungin's present collateral counsel, Mr. Mungin has made out a prima facie case of a *Brady* and *Giglio* violation which, at a minimum, warrants the granting of an evidentiary hearing.

As noted above, Ronald Kirkland was the key prosecution witness against Mr. Mungin. At trial, Kirkland testified that on Sunday, September 16, 1990, between 1:30 and 2:00 PM, he stopped at the Lil' Champ store on Chaffee Road near Interstate 10, in Jacksonville (T663-64). There was a tan or cream colored compact car parked in the lot (T676). As Kirkland went in, a black man coming

out of the store carrying a brown bag almost knocked him over (T664, 671). Kirkland got a brief glimpse at the man as they passed; then, because he was angry at being bumped, Kirkland turned and saw the back of the man's head (T677-78). The man coming out of the store had longish-hair done up in a "jeri curl," and had a growth of beard (T680-81). The beard could have been a couple of weeks old, but Kirkland could not give any estimate as to how old the growth appeared (T681).

Kirkland did not see anyone in the store; he got a diet coke and waited for the clerk to return (T664). A few minutes later, Kirkland noticed a woman lying on the floor behind the counter, near an open cash register (T664-65, 667). He removed two undissolved aspirins from the woman's mouth and attempted CPR; the woman started to cough blood, and Kirkland turner her on her side and noticed a wound on her head (T665). Another customer came in and called 911 (T665). The other customer also looked at the open cash register (T681). Kirkland did not know if the other customer checked both cash registers in the store (T681-82). The woman, Betty Jean Woods, a store employee, was taken to a hospital (T652, 659, 689). She died four (4) days later of a gunshot wound to her head (T639, 661).

On September 16, 1990, the day he found Ms. Woods, Kirkland told a

detective he was not sure he would be able to recognize the man who had come out of the store as he went in (T682). On September 20, 1990, however, the same detective showed Kirkland six (6) or seven (7) photographs; Kirkland narrowed the pictures down to three, then picked out a photograph of Anthony Mungin (T671-674, 683). In the photograph, Mr. Mungin had short hair and no beard (Exhibit 7). The officer who showed Mr. Mungin's photograph to Kirkland did not testify at trial. Kirkland also identified Mr. Mungin in the courtroom at trial (T671).

The information contained in George Brown's affidavit substantially impeaches Kirkland's version of events as testified to at trial and, hence, qualifies as evidence that the State must disclose under *Brady* and its progeny. As Mr. Brown indicates in his affidavit, he did give a statement to law enforcement on the date in question; Mr. Brown's statement, given to Detective Conn as reported in Detective Gilbreath's homicide report, stated as follows:

Detective Conn also interviewed George Brown, the other white male who entered the store the same time as Kirkland. He stated he went into the store and took a bottle of Gatorade to the counter and then waited. After a short time he looked around and saw the victim on the floor coughing and spitting up blood. He called 9-1-1 and then checked the registers after Kirkland was administering first aid to the victim. He stated he did not notice anyone leaving the store as he entered.

(2PCR 73).

While it is true that Detective Gilbreath's report was turned over to defense counsel prior to Mr. Mungin's trial and the record reflects that Mr. Brown was listed as a State witness, a proper resolution of this claim must contemplate the important, indeed, the crucial fact, that, as Mr. Brown states in his affidavit, the version of events as reported in Detective Gilbreath's report "is false" (2PCR 71). As he explains in an affidavit, Mr. Mungin's trial counsel, Charles G. Cofer, who was constitutionally entitled to rely on the State playing by the rules, saw no reason to investigate George Brown's police statement given that there was nothing in the police report to indicate that Brown had anything to add to the case and the fact that Kirkland, who claimed to be the closest thing to an "eyewitness" (at least to the extent that he was going to identify Mr. Mungin as the one he saw exiting the store), was the key prosecution witness. Defense counsel Cofer states as follows in support of Mr. Mungin's claim:

AFFIDAVIT OF CHARLES G. COFER

1. My name is Charles G. Cofer, and I am presently a sitting county court judge in the Fourth Judicial Circuit in and for Duval County, Florida. I have previously been subpoenaed to give testimony in post-conviction proceedings in the case of State of Florida v. Anthony Mungin, and this affidavit is given in connection with further post-conviction proceedings.

2. Prior to taking the bench, I served as an Assistant Public Defender for the Fourth Judicial Circuit. During that time, I represented Anthony Mungin at the trial court level in the first-degree capital murder prosecution relating to the death of Betty Jean Woods. As lead counsel for Mr. Mungin, I had primary responsibility for all aspects of the case, and was familiar with the pre-trial discovery provided by the State of Florida.

3. I have recently been provided with an affidavit executed by an individual named George Brown, which states Mr. Brown's knowledge concerning the death of Betty Jean Woods. I have also reviewed the homicide investigation report authored by Detective Gilbreath dated November 5, 1990. Detective Gilbreath was the lead law enforcement officer in charge of the investigation into Ms. Woods' murder.

4. Mr. Brown's affidavit contradicts the version of events as testified to at trial by the State's key witness, Ronald Kirkland, in many significant ways. Ronald Kirkland was the primary prosecution witness based upon his assertion that he was the first and only person in the Lil' Champ store, and that he was the one who discovered Ms. Woods after she was shot. Mr. Kirkland testified at trial that he observed a man coming out of the Lil' Champ Store carrying a brown bag as he entered the store. Kirkland later identified this man as Anthony Mungin. Because there were no eyewitnesses to the murder, Kirkland's identification of Mr. Mungin was extremely important evidence. Although I attempted to undermine Kirkland's testimony during cross-examination, any evidence that was available that I could have used to further undermine his credibility (especially his purported identification of Anthony Mungin) would have been useful and would have been presented. I would also expect, under the State's obligation under *Brady v. Maryland*, that the prosecution would disclose to me any favorable evidence which could have been used to impeach Kirkland or otherwise

undermine his testimony and identification of Mr. Mungin.

5. Prior to trial, the State provided me with a copy of Detective Gilbreath's homicide report, in which there is brief mention made of George Brown and the information he supposedly told Detective Conn when he was interviewed on the day Ms. Woods was shot. I relied on this police report as being an accurate and truthful account of what Mr. Brown told the police. The version of Mr. Brown's statement contained in the homicide report generally supported the version of facts provided by Mr. Kirkland, and provided no suggestion that Mr. Brown had information that would be useful to impeach Mr. Kirkland's version of events.

7. Because the information contained in the police report appeared to be of much less importance than the information provided by Kirkland, and due to the fact that Kirkland became the chief prosecution identification witness, our efforts focused on attempting to undermine Kirkland's testimony at trial. Because I relied on the veracity of the police report, apparently no one from the defense team contacted or spoke with Mr. Brown prior to trial.

8. Mr. Brown's affidavit contradicts Mr. Kirkland's version of events, and demonstrates that the police report was inaccurate in terms of explaining the information that Mr. Brown provided to law enforcement. When handling criminal cases, I expected the State to provide me with an accurate recitation of what witnesses told the police, but I was never provided with the information contained in Mr. Brown's affidavit. Had the State provided me with an accurate report containing the true version of events that Mr. Brown witnessed, this would have made a tremendous difference in terms of the presentation of Mr. Mungin's case. Every effort would have been made to interview Mr. Brown and present his conflicting testimony, given that it contradicts and impeaches Kirkland's version of events and his identification of Anthony Mungin.

9. It is my understanding that Mr. Brown is an unbiased witness with no prior criminal background, in contrast to Mr. Kirkland, who had an extensive criminal history and whose credibility was already in question. It would have been helpful to have a disinterested witness with no criminal background who would have been able to testify and contradict Kirkland's testimony. However, the State never provided me with an accurate and truthful account of Mr. Brown's

involvement in the case.

10. Under penalties of perjury, I declare that I have read the foregoing statement and that the facts stated in it are true.

(2PCR 74-75).[18]

As Mr. Brown attests in his affidavit, there was no one in the store when he went inside, which completely contradicts Kirkland's trial testimony that he was the first one to arrive at the scene; because he claimed to have been the first one to arrive at the scene, he was able to testify to observing a black male carrying a brown bag exiting the store who he later identified as Mr. Mungin (T676). Kirkland also testified that when he entered the store, there was no one else there, he got a soda, and waited for the clerk to return (T664); after a few moments, Kirkland claimed to notice the victim lying on the floor behind the counter near an open cash register and that he was the one to first administer aid to her (T664-65). Only *after* these events transpired did Kirkland acknowledge that another customer came in and called 911 (T665). As Mr. Cofer's affidavit attests, the defense team was unaware of the truthful accounting of Mr. Brown's involvement in the case, and had the defense been provided with this information, it would have been presented at trial because of its significance in terms of contradicting the key testimony of Ronald Kirkland.

D. Mr. Mungin Has Established a *Brady* and *Giglio* violation; in the alternative, trial counsel was ineffective; and/or Brown's affidavit qualifies as newly-discovered evidence of impeachment. Cumulative Consideration of Prior Claims is Required to Analyze Mr. Mungin's Entitlement to Relief.

1. *Brady* violation.

The Supreme Court has long held that the State has a constitutional duty to disclose exculpatory and impeachment evidence to a criminal defendant in advance of trial. *See Brady v. Maryland*, 373 U.S. 83 (1963). As this Court has explained, "[u]nder *Brady*, the government's suppression of favorable evidence violates a defendant's due process rights under the Fourteenth Amendment." *Rogers v. State*, 783 So. 2d 980 (Fla. 2001) (citing *Brady*, 373 U.S. at 86). The Supreme Court made clear in *Kyles v. Whitley*, 514 U.S. 419 (1995), that due process requires the prosecutor to fulfill his obligation of knowing what material, favorable, and exculpatory evidence is in the State's possession and disclosing that evidence to defense counsel:

Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

Id. at 439. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf." *Id*. at 437. *See also Strickler v. Greene*, 527 U.S. 263, 281 (noting "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"). The *Strickler* Court reiterated that a prosecutor has a duty to disclose exculpatory evidence even though there has been no request by the defendant, and that the prosecutor has a duty to learn of any favorable evidence known to individuals acting on the government's behalf (such as law enforcement). *Id*. at 280-81.

In *Banks v. Dretke*,124 S. Ct. 1256 (2004), the Supreme Court, in addressing a *Brady* claim, held that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." Thus, in the words of the Supreme Court, a rule "declaring `prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 1275. Under *Banks*, the burden is on the State to "set the record straight," not upon the defense, at the time of trial or during the collateral proceedings, to intuit that the State is holding information back from the defense.

See also Strickler v. Greene, 527 U.S. 263 (1999). In Mr. Mungin's case, despite having numerous opportunities to do so, failed to ever "set the record straight" at any time in the pretrial or trial proceedings, or during Mr. Mungin's first collateral proceedings, where, Detective Gilbreath testified yet never disclosed to Mr. Mungin or his collateral counsel that the information contained in his police report as to George Brown was false. Under the authority of both *Banks* and *Strickler*, Mr. Mungin submits that the fact that the instant *Brady* claim was not presented in his earlier Rule 3.851 motion is not dispositive; indeed it is irrelevant.[19] As the Supreme Court explained in both *Banks* and *Strickler*, it is the *prosecution* that has the burden of disclosure of exculpatory evidence, including impeachment evidence, and the defendant does not have the obligation to assume that the State failed to comply with its constitutional obligations or to scavenge for hints along the way that the State acted improperly. Indeed, the *Brady* claim that was found meritorious in *Banks* was presented in the defendant's *third* state postconviction petition, the Court having concluded that the defendant did not need to establish his failure to present the issue in his prior collateral challenges due to the overarching principle that it is the State that has the duty to disclose.

This Court has frequently been presented with *Brady* claims where, like here, the name of a particular witness had been listed by the State in pre-trial

discovery, but nevertheless found that a *Brady* violation occurred because information regarding statements made by that witness or about that witness had not been disclosed to the defense. In *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004), the Florida Supreme Court vacated a capital murder conviction and ordered a new trial in a case where the defense not only had the name of a witness (Gail Milligan), but had deposed the witness and cross-examined her on the witness stand at trial. This Court did not find that because trial counsel had the witness's name, his failure to learn of the undisclosed favorable evidence, to investigate it, and present it, meant that the defendant was barred due to a want of diligence from presenting his *Brady* claim once he learned of the existence of the withheld evidence.

Similarly, in *Cardona v. State*, 826 So. 2d 968 (Fla. 2002), the Florida Supreme Court vacated a capital murder conviction and ordered a new trial in a case where the defendant not only had the name of a witness (Olivia Gonzalez-Mendoza, who was the co-defendant), but had deposed the witness and cross-examined her at trial. As in *Mordenti*, the *Cardona* Court did not find that the defendant could not prevail on her *Brady* claim simply because trial counsel knew of the witness and had deposed and cross-examined her. Likewise, in *Hoffman v. State*, 800 So. 2d 174 (Fla. 2001), the Florida Supreme Court ordered a

new trial in a capital murder conviction. There, the defense, in postconviction, learned that hair found in the victim's hand did not originate from the defendant. In granting a new trial, the Florida Supreme Court wrote:

The State's additional argument is that defense counsel Harris elicited information at trial from a serologist about the hairs. The information solicited, however, was merely the fact that hairs were gathered at the scene. The State asserts this testimony sufficiently apprised the defense of the existence of this evidence. This argument is flawed in light of *Strickler* and *Kyles*, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory. In failing to do so, the State committed a *Brady* violation when it did not disclose the results of the hair analysis pertaining to the defendant.

Hoffman, 800 So. 2d at 179.

The fact that Kirkland was cross-examined at trial about some inconsistencies in his testimony does not lead to the conclusion that the withheld information about George Brown would have only provided cumulative evidence of impeachment.[20] "The contradictory versions of significant events, particularly in light of the implication of witness coaching, is qualitatively different from the matters on which [Kirkland was] impeached" at trial, thus making the suppression material. *Cardona*, 826 So. 2d at 981. That there was an unbiased disinterested witness who completely contradicted Kirkland's version of events "would not have been merely repetitious, reinforcing a fact that the jury already knew; instead, `the truth would have introduced a new source of potential bias.'" *United States v. Rivera Pedin*, 861 F. 2d 1522, 1530 (11th Cir. 1988) (quotation omitted). *See also United States v. Nichols*, 242 F. 3d 391 (10th Cir. 2000) (unpublished decision) ("some of the government's assertions of cumulativeness ring hollow because it is at least arguable the defense could have been aided by more rather than fewer similar sightings of [John Doe #2] with Timothy McVeigh"); *Washington v. Smith*, 219 F. 3d 620, 634 (7th Cir. 2000) (the fact that one witness testified to defendant's alibi did not render additional alibi witnesses cumulative; the additional testimony "would have added a great deal of substance and

credibility to Washington's alibi"); *United States v. Scheer*, 168 F. 3d 445 (11th Cir. 1999) (prosecutor's threatening remarks to his chief witness material, despite witness' impeachment with previous history of perjury, and compelling independent evidence against defendant); *Singh v. Prunty*, 142 F. 3d 1157 (9th Cir. 1997) (suppressed evidence of benefits promised key witness material, despite overwhelming independent circumstantial evidence against defendant); *United States v. Smith*, 77 F. 3d 511 (D.C. Cir. 1996) (suppressed dismissal of two counts against government witness material, even where dismissal of ten other counts was disclosed, witness had been impeached as drug user, drug dealer, and five-time convicted criminal, and witness' testimony was "merely corroborative" of other testimonial and physical evidence sufficient to prove defendant's guilt); *Carriger v. Stewart*, 132 F. 3d 463 (9th Cir. 1997) (where state's only direct witness impeached with burglary convictions, immunity agreement, and history of dishonesty, suppressed evidence of witness' violent crimes, psychiatric diagnosis, and prison disciplinary record material, notwithstanding significant independent inculpatory evidence, including defendant's fingerprints on tape binding victim and defendant's possession of fruits and implements of the crime); *United States v. Brumel-Alvarez*, 991 F. 2d 1452 (9th Cir. 1992) (suppressed DEA memo which was highly critical of credibility of chief prosecution witness was material, despite

"already impressive quantity and qualify of impeaching evidence," and government contention that memo contained "gratuitous opinions" of individual agent).

2. *Giglio* violation.

In addition to a *Brady* violation, the information contained in Mr. Brown's affidavit further establishes that the State knowingly presented false and/or misleading evidence through the testimony of Kirkland. Under *Giglio*, relief is warranted if the false testimony "could . . . in any reasonable likelihood have affected the judgment of the jury." *Williams v. Griswald*, 743 F. 2d 1533, 1543 (11th Cir. 1984) (quoting *Giglio*, 405 U.S. at 154). The focus is on the affect that Kirkland's false testimony may have had on the jury, and the standard for establishing a *Giglio* violation is less onerous than for a *Brady* violation. *United States v. Agurs*, 427 U.S. 97 (1976).[21] Despite the State's knowledge from Brown that he, not Kirkland, was the first witness to appear at the Lil' Champ Store, and that he, not Kirkland, was the first to administer aid to the victim, the State instead permitted Kirkland to testify falsely before the jury. Under an appropriate *Giglio* analysis, Mr. Mungin submits that, in addition to his claim under the legal standard of *Brady*, he is also entitled to relief under *Giglio* and its progeny.

3. Newly Discovered Evidence.

In the alternative, Mr. Mungin asserts that the information contained in Mr. Brown's affidavit is newly-discovered evidence warranting relief. *See Jones v. State*, 591 So. 2d 911 (Fla. 1991). To determine the weight of the new evidence presented by Mr. Mungin, as well as the likelihood that it would produce an acquittal at retrial, this Court must not assess the newly discovered evidence in a vacuum. In *Jones*, the Court stated that the trial court "will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Jones*, 591 So. 2d at 916. "This cumulative analysis must be conducted so that the trial court has a 'total picture' of the case. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a *Brady* claim." *Lightbourne v. State*, 742 So. 2d 238, 247-48 (Fla. 1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)). Evidence offered for impeachment purposes must also be included in the trial court's cumulative analysis. *Robinson v. State*, 770 So. 2d 1167,1171 (Fla. 2000).

This Court is required to consider the new evidence offered pursuant to *Jones* cumulatively with other newly discovered evidence and with *Brady* material, and the previously presented *Brady* material and evidence that trial counsel unreasonably failed to develop and present. When all of this evidence is considered cumulatively, it is clear that Mr. Mungin was denied a constitutionally

adequate adversarial testing. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996); *Mordenti v. State*, 894 So. 2d 161 (Fla. 2004). Rule 3.850 relief is warranted. A new trial must be ordered.

4. Cumulative Consideration is Required.

When assessing whether Mr. Mungin is entitled to relief, the Court must also consider the cumulative effect of the prior information that the jury did not know, either because it was improperly withheld by the State or because trial counsel failed to present it. The information contained in the instant motion, when considered cumulatively to the claims previously made by Mr. Mungin, *see Mungin v. State*, 932 So. 2d 986 (Fla. 2006), as well as the fact that, on direct appeal, the Court found error with regard to Mr. Mungin's conviction for premeditated first-degree murder, establish that confidence is undermined in the jury's verdict of felony-murder, and that relief is warranted at this time.

For example, in his prior 3.851 motion, Mr. Mungin asserted that the jury did not hear of significant additional impeachment evidence of Kirkland due to trial counsel's failure to investigate (and now it is known that there is even more substantial impeachment that was never disclosed by the State). Mr. Mungin alleged that trial counsel failed to utilize critical impeachment evidence in his own file, evidence which would have given the jury a true picture of Kirkland's

motivations and thus his credibility. This evidence, in the form of a pending violation of probation warrant and an outstanding capias, was neither elicited on Kirkland's cross-examination nor argued in closing arguments. In denying this claim, this Court concluded that this allegation was meritless under the prejudice prong of *Strickland*:

Mungin's first subclaim is that trial counsel was ineffective for failing to sufficiently impeach the testimony of Ronald Kirkland. Specifically, Mungin argues that Cofer should have been made the jury aware that Kirkland was on probation at the time of the trial and that warrants had been issued for Kirkland's arrest on violation of probation and subsequently recalled.[]

Even if Cofer's performance was deficient because he failed to discover and use Kirkland's probationary status as impeachment evidence, Mungin has failed to establish prejudice. Cofer attacked Kirkland's identification of Mungin on cross-examination of Kirkland, and by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, whose descriptions of the perpetrator were different from Kirkland's. In closing argument, Cofer argued extensively that due to these inconsistencies, Kirkland's identification could not be believed beyond a reasonable doubt. Moreover, Kirkland testified that he did not tell anyone from the State Attorney's Office that he was on probation and that he did not have any deals with the State in exchange for his testimony at Mungin's trial. Mungin does not allege that any deals were made. As for trial counsel's failure to inform the jury of the recalled warrants for Kirkland's arrest, because the warrants were not recalled until after the trial it

cannot be said that counsel's performance was deficient.

Mungin II, 932 So. 2d at 998-99.

At the evidentiary hearing, Cofer himself testified that had he known that Kirkland was on probation during the pendency of this case in addition to having had a capias recalled just prior to Mr. Mungin's trial, he would have wanted to elicit this information from Kirkland, as he explained:

Well, prior to trial you have the detective, who shows a photospread, who indicates that the witness at the time of seeing the photospread said that he couldn't swear that the man he picked out was the person, that he was fairly certain and looked like him. At trial Mr. Kirkland showed very little hesitancy, identified Mr. Mungin as being the person, and also denied making the statement to – or indicating he could not recall telling Detective Conn that he wouldn't be able to swear. Having the fact that, one, he was on probation, and, two, that there was some outstanding warrant for him, would have been an area that you would typically inquire of a witness about to cast doubt upon the certainty of his identification at trial. In other words, if you show that there's a shift, in other words, at the time of the identification on a photospread, he indicated that he couldn't swear to it, and then much later at trial he does, showing the status of him being on probation and a warrant outstanding would tend to suggest that Mr. Kirkland had strengthened his identification because of concerns for himself.

(PCR274). He agreed that it would have been an effective argument to make under the circumstances in this case because he would have been able to argue that Kirkland was more certain at trial than he was earlier about his identification of Mr. Mungin because he had pending legal difficulties and was attempting to curry favor with the State (PCR361-62). Despite knowing that Kirkland had been on probation, he did not use this evidence to impeach him at trial.

Mr. Mungin also alleged in his prior Rule 3.851 proceeding that trial

---

[16]As the State acknowledged at the case management hearing below, Kirkland "may have been the key witness" but it nonetheless took the position that his testimony "certainly wasn't the key evidence" (T. Hearing 8/12/09 at 9).

[17]Brown's affidavit was quoted in its entirety in Mr. Mungin's Rule 3.851 motion and was attached to the motion as an exhibit.

[18]Judge Cofer's affidavit was also quoted in Mr. Mungin's Rule 3.851 motion and attached thereto as an exhibit. There is a typographical error in the affidavit insofar as the paragraph numbering is concerned. Paragraph 7 in the affidavit should be numbered 6, and the remaining paragraph numbering is one number off as a result.

[19]Alternatively, to the extent that the State, in the face of explicit Supreme Court law, will argue that trial counsel was not diligent, the Brown affidavit establishes that trial counsel provided ineffective assistance. *See Strickland v. Washington*, 466 U.S. 668 (1984). If the State did not fail to disclose this information and/or did not present false or misleading evidence, trial counsel was ineffective in failing to locate, speak to, and present evidence from Mr. Brown. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). If trial counsel's performance was deficient in failing to learn of the information possessed by Brown, then Mr. Mungin was prejudiced just the same. The *Strickland* prejudice standard is the same as the *Brady* materiality standard and requires establishing that confidence is undermined

counsel, without a reasonable tactic, failed to provide the jury with information arising from the deposition of Detective Conn that Kirkland had not been able to swear in court that the person he identified as Mr. Mungin in a photo spread was the actual person he saw on the day in question. As established at the state court

---

in the outcome. *Kyles*, 514 U.S. at 434.

[20]In assessing the materiality of the suppressed information, the Court must also consider that there was additional evidence of impeachment that was not brought out by defense counsel at trial. This claim was presented in Mr. Mungin's first Rule 3.850 motion and, this Court, despite assuming that defense counsel was deficient in failing to discover and use Kirkland's probationary status as impeachment evidence, concluded that no prejudice had been established because Mr. Cofer did challenge Kirkland's testimony on other grounds. *Mungin v. State,* 932 So. 2d 986, 998-99 (Fla. 2006). Additionally, the Court rejected Mr. Mungin's claim that defense counsel unreasonably failed to present the testimony of Detective Conn to testify about the weaknesses of Kirkland's alleged identification of Mr. Mungin. *Id*. at 999.

[21]In *Agurs*, the Supreme Court explained that the post-trial discovery of suppressed information can give rise to several legal claims. One type of claim occurs where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Agurs*, 427 U.S. at 103. In this type of situation, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id*. Unlike a *Brady* situation where no intent to suppress is required to be established, a "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." *Id*. at 104. Thus, although both *Brady* and *Giglio* require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. The standard for establishing "materiality" under *Giglio* has "the lowest threshold" and is "the least onerous." *United States v. Anderson*, 574 So. 2d 1347, 1355 (5th Cir. 1978).

hearing, Detective Conn's deposition clearly contained information that would have been helpful for the defense at trial:

> Q [Prosecutor] Detective Conn was asked about what Mr. Kirkland told her?
>
> A [Mr. Cofer] Correct.
>
> Q Did she not state in deposition–and I can refer you to page 54 just to make sure we get the correct quote there. Take a second to look and make sure we're–I believe it's on page 54 and 57 also.
>
> (Witness reading transcript)
>
> A On 57, and this is in response to your questions during cross in the depo, and you asked him could he swear to it in court. Answer: right. And he said he couldn't, I guess, based on the photograph itself. And her answer was: He said he couldn't based–he couldn't based on the photograph.
>
> Q Okay. I gather that could have been brought out if you had called her on your case?
>
> A Yes.

(PCR348-49). This Court rejected this claim on its merits:

> Mungin also asserts that trial counsel was ineffective in failing to call Detective Christie Conn to testify regarding Kirkland's identification of Mungin in a photo spread. Specifically, Mungin asserts that according to Detective Conn's deposition testimony, Kirkland stated at the time of the identification that he could not swear in court that the man in the photograph was the same man he saw exiting the store on the day of the murder. After the evidentiary hearing, the trial court denied this claim, finding that Cofer "made a tactical decision,

after discussing the possibility with the Defendant, not to call Detective Conn as a witness."

Cofer testified at the evidentiary hearing that after discussing the issue with Mungin, he made a tactical decision not to call Detective Conn. Cofer stated that it was their decision that unless they had something "pretty important" to present, they wanted to try to reserve initial and final closing argument, and that on balance Kirkland admitted to most of the things that they would have used Detective Conn to impeach. Mungin argues that Cofer's asserted reason for failing to call Detective Conn is belied by the record, which shows that the defense team waived initial closing argument.

Although trial counsel ultimately waived initial closing argument, that does not demonstrate that at the time the decision was made not to call Detective Conn, trial counsel did not intend to use both the initial and final closing. Further, Cofer stated at the evidentiary hearing that the decision was part of his trial strategy, which he discussed with Mungin and to which Mungin agreed. Mungin did not testify at the evidentiary hearing and therefore failed to present any evidence to rebut Cofer's testimony that Mungin was consulted about this decision.

Even assuming that counsel's performance was deficient in this regard, we conclude that Mungin has failed to establish prejudice. As noted above, trial counsel attacked Kirkland's identification of Mungin on cross-examination by bringing out the limited time he had to actually view the perpetrator and the fact that it took him fifteen to twenty minutes to pick Mungin out of the photo lineup. Cofer also brought Kirkland's identification into question by his cross-examination of the victim of the Monticello shooting and the eyewitness to the Tallahassee shooting, who gave different descriptions of the perpetrator than did Kirkland. Accordingly, out confidence in the outcome of Mungin's trial is not undermined by Cofer's failure to call Detective Conn to testify.

Mungin II, 932 So. 2d at 999.

And, most significantly, in his prior 3.851 proceeding, Mr. Mungin alleged that trial counsel failed to adequately investigate and present favorable evidence, namely, that Mr. Mungin had an alibi for the day in question and that someone named "Ice" had committed the crime. The lower state trial court denied this claim, relying on counsel's testimony that he did investigate and made a decision not to present the evidence in question because it was "inconsistent" with the facts of the case (PCR207). On appeal, this Court rejected the merits of Mr. Mungin's claim, finding that, although Mr. Mungin had established deficient performance, he failed to establish prejudice:

> In his final guilt phase ineffectiveness subclaim, Mungin asserts that trial counsel was ineffective for failing to pursue an alibi defense. The trial court denied this claim, finding that Cofer's testimony that the alibi defense was inconsistent with the facts of this case and that such testimony would not have benefitted Mungin was credible. The trial court concluded that Cofer's strategic decision not to pursue this defense did not result in deficient performance or prejudice. We agree. Mungin's claim that a man named "Ice" would have helped to establish his innocence is not supported by any credible evidence.
>
> The Court has rejected ineffective assistance of counsel claims alleging a failure to present an alibi defense when counsel has investigated and made a strategic decision, supported by the record, not to present the defense. *See, e.g. Reed v. State*, 875 So. 2d 415, 429-30 (Fla. 2004) (affirming the trial court's finding that counsel was not ineffective for failing to present an alibi defense when, after an investigation, trial counsel concluded that the available testimony provided, at best, an incomplete alibi).

In this case, it appears that counsel was confused about the details of Mungin's alibi defense. However, Mungin has failed to establish prejudice. Mungin was linked to the crime by the ballistics evidence that identified the gun used in the Tallahassee and Monticello shootings, and found in Mungin's room the night he was arrested, as the same gun that was used to shoot the victim in this case. The State also presented the eyewitness testimony of Ronald Kirkland, who identified Mungin as the man he saw leaving the store. In addition, Mungin presented no evidence at the evidentiary hearing that trial counsel would have been able to locate "Ice" or any evidence connecting "Ice" to the gun. Although Edward Kimbrough and Jesse Sanders testified that they knew an individual who went by the name "Ice," Kimbrough had not seen "Ice" since the early or mid-1990s and Sanders had not seen him since 1987. Neither witness testified that he could have helped Cofer find "Ice" in 1992, and neither witness directly supported Mungin's claim that he gave "Ice" the gun.

Equally important, Mungin's other alibi witnesses do not establish that Mungin could not have committed the murder on the afternoon of September 16, 1990. The testimony of Brian Washington, who was sure that the date he drove Mungin to Jacksonville was September 16, 1990, placed Mungin in Jacksonville on the day of the shooting. Philip Levy and Vernon Longworth remembered seeing Mungin in Jacksonville on a Sunday in September but neither could remember the exact date or time. Therefore, even assuming that the day they saw Mungin was September 16, 1990, their testimony does not provide persuasive evidence that Mungin would have been unable to commit the murder between 1:30 and 2:00 that afternoon.

In light of the strong evidence linking Mungin to the crime and the weakness in the testimony of Mungin's alibi witnesses, we conclude that Mungin has failed to establish that he was prejudiced

by Cofer's failure to follow up on his alibi defense. . .

Mungin II, 932 So. 2d at 999-1000.

In light of the Court's decision regarding deficient performance, it is now settled that trial counsel failed to meaningfully investigate and that Cofer's decision to forego the presentation of a defense case was based on his own misunderstanding of the facts of the case. *Mungin II*, 932 So. 2d at 1000 ("In this case, it appears that counsel was confused about the details of Mungin's alibi defense"). According to the police report generated as a result of a November 21, 1991, interview with Mr. Mungin, Mr. Mungin stated he had taken a burgundy Ford Escort from a motel in Kingland, GA, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, Mr. Mungin went to Monticello where he was involved in a shooting, and then to Tallahassee where he was also involved in a shooting. Mr. Mungin then stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shooting. Later in the statement, Mr. Mungin said he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus. In that first statement, Mr. Mungin said that the person he was dealing with in Jacksonville was someone named "Snow." Mr. Mungin next related that he spent several days doing drugs in Georgia, after which he was driven back to

Jacksonville, where he found the Escort stripped. He then procured another car, a Dodge, and purchased the gun back from "Snow." Then he went to see a girl on West 28th Street and then went to Pensacola to see Charlette Dawson. He said he was in Pensacola between 7 and 8 PM on the same day, and he returned to Georgia after spending two days in Pensacola.

In his second statement to police on March 31, 1992, Mr. Mungin clarified that the person he dealt with was named "Ice," not "Snow," and that he gave the gun, car, and money to "Ice" in exchange for cocaine and indicated that he would be back. Mr. Mungin then discussed the shooting in Monticello and Tallahassee, and his uncle thereafter took him back to Georgia. Most important, in this statement, he stated "he retrieved the gun which he had loaned/sold to a black male along with the car." He said it was daytime, almost evening, when he got the beige car, and he drive straight to Pensacola, stopping only for gas in Tallahassee. He arrived in Pensacola in the nighttime.

Cofer's misunderstanding of Mr. Mungin's alibi and his concomitant failure to investigate resulted in prejudice to Mr. Mungin. The jury was deprived of testimony that was consistent with and buttressed the defense theory that Mr. Mungin did not commit the homicide and that Kirkland's identification was mistaken.

At the evidentiary hearing, Mr. Mungin presented extensive and unrebutted testimony which established the existence of "Ice" and also that Mr. Mungin could not have committed the murder. Edward Kimbrough's testimony credibly verified the existence of "Ice" as someone who would regularly hang out at the same place in the Moncrief area of Jacksonville selling drugs (PCR380-81). "Ice" would always be armed and always was driving different vehicles (PCR381-82), and was described as a tall man, from 190 to 250 pounds, with a "jeri-curl" hair style (PCR382).[22] Jesse Sanders gave an even more vivid physical description of "Ice" and confirmed that his regular hangout was in the Moncrief area (PCR392-94). "Ice" was a known hustler who also knew how to make money illegally by stealing cars and selling drugs (PCR395-98). Sanders would often see Mr. Mungin in cars that "Ice" was usually in possession of (PCR398).

Brian Washington also knew Mr. Mungin at the time in question, and testified that the last time he saw Mr. Mungin was around 10:30 AM on September 16, 1990, at a convenience store in Kingsland (PCR407-08).[23] He recounted the

---

[22] 36Curiously, at trial, Ronald Kirkland testified that the man he saw coming out of the Lil' Champ store in Jacksonville had longish hair done up in a "jeri curl" (T680-81).

[23] 37Washington knew it was September 16 because of several birthdays in the family in September and September 16 was a Sunday, which is the day he took his

brief conversation they had during which Mr. Mungin said he needed a ride to Jacksonville, and Washington told him he could give him a ride but had to first take his wife to church (PCR408). After he took his wife to church, Washington picked up Mr. Mungin from his cousin, Angie Jacobs', house (PCR409). They then drove to Jacksonville and Washington dropped Mr. Mungin off somewhere near Golfair Boulevard (PCR410). About a week or so later, Washington learned that Mr. Mungin had been arrested for a homicide (PCR410). After he learned this, Washington told his mother that it could have been true because of the time frame (PCR411). No one from Mr. Mungin's legal team ever contacted him about the case, and had he been asked he would have told them what he knew (PCR411).

Phillip Levy testified that in the mid-to-late 1980s, he and Mr. Mungin became friends and would hang out, drink, and listen to music (PCR430). The last time he saw Mr. Mungin was in 1990 on a Sunday between 11:30 AM and 1:00 PM (PCR431-32).[24] They met at Levy's aunt's house and then went to the area of

---

wife to church (PCR412).

[24] 38In rejecting Mr. Mungin's claim, this Court wrote that Levy "remembered seeing Mungin in Jacksonville on a Sunday in September, but neither could remember the exact date or time." *Mungin II*, 932 So. 2d at 1000. However, as the evidentiary hearing testimony established, Levy last saw Mr. Mungin between 11:30 AM and 1:00 PM "[i]n the middle of September on a weekend" (PCR431-32; 435). This Court's "finding" is contrary to the record; Levy's testimony was

28th Street and Stuart to see if Donetta Dues, a former girlfriend of Mr. Mungin, was home (PCR433). After that, Levy and Mr. Mungin went to Levy's uncle's house, and then Mr. Mungin left to his aunt's house (PCR433-34). The last time Levy saw him was around 4:30 or 5:00 PM (PCR434). He was pretty sure this occurred on a Sunday in mid-September of 1990 (PCR435). Levy was sure it was a Sunday because when they went to see Ms. Dues, she was at church (PCR436). He did not know about Mr. Mungin's arrest for about a year after it happened because he had moved to another area of Jacksonville (PCR437-38). He did not know he had any information that would be helpful so he did not think to contact someone (PCR438). He did not see Mr. Mungin in the possession of a gun on that day (PCR441).

Finally, Mr. Mungin presented the testimony of Vernon Longworth, who also knew Mr. Mungin from the Jacksonville area and became friendly with him (PCR477). Longworth's nephew is Philip Long (PCR478). In 1990, Longworth was residing at 28th and Stuart in Jacksonville (PCR478). The last time he saw Mr. Mungin was on a Sunday afternoon when he came to his house at 1:00 to 2:00

---

more specific than merely that he saw Mr. Mungin "on a Sunday in September" at an undetermined time.

PM for a few hours to visit (PCR479).[25] He knew it was a Sunday because it was football season and the TV was on (PCR479). Mr. Mungin asked if he could shower because it was a hot day (PCR480). Longworth also testified that Mr. Mungin had gone to Donetta Dues's house across the street to visit the child he had with Ms. Dues (PCR480). After Mr. Mungin took a shower, he and Philip and a few other guys left to go to a juke joint (PCR480). In 1992 and 1993, Longworth resided in Jacksonville and would have been available to talk with anyone from Mr. Mungin's legal team had he been contacted (PCR481).

This evidence was consistent with Mr. Mungin's account of his whereabouts in his police statements as well as the facts of the case. First, Mr. Mungin indicated that he was driven by a baser who picked him up at his aunt's house in Kingsland and drive him to Jacksonville where he was dropped off. Brian Washington testified that he picked Mr. Mungin up from his cousin's house in the morning in Kingsland and dropped him off in Jacksonville (PCR409-10). Mr. Mungin indicated in his police statement that he was looking for a young lady on 28th and Stuart. Philip Levy testified that he saw Mr. Mungin about 11:30 or 1:00

---

[25] 39As did Levy, Longworth clearly testified to the time that Mr. Mungin arrived at his house, and thus the record conclusively contravenes the Court's "finding" that Longworth also failed to remember the exact time he saw Mungin on the day in question. *Mungin II*, 932 So. 2d at 1000.

PM in the afternoon and Mr. Mungin went across the street from the corner of 28th and Stuart to see if Ms. Dues, his girlfriend, was home (PCR432-33). Levy saw Mr. Mungin again around 4:30 or 5:00 (PCR434). That time would be consistent with Mr. Mungin telling the police he left Jacksonville late in the day, almost nighttime. Vernon Longworth confirmed the chronology by stating that Mr. Mungin came to his house around 1 or 2 PM in the afternoon and stayed until about 2:30 or 3:00. Longworth allowed Mr. Mungin to take a bath (PCR479-80); Levy had also testified that Mr. Mungin stated he was going to Longworth's to bathe (PCR434). Longworth also confirmed that Mr. Mungin went to see Ms. Dues (PCR480). Most significantly, the owner of the Dodge Monaco had testified at trial that her vehicle was stolen between 10:00 AM on September 15 and 1:00 PM on September 16 (R805-06). None of the witnesses presented below testified that they saw Mr. Mungin with a vehicle. The testimony adduced by Mr. Mungin supports Mr. Mungin's account to the police and supports his alibi, and all of these witnesses testified at the evidentiary hearing that they were available at the time of trial and would have testified if asked at trial. Had this testimony been presented at trial, there is more than a reasonable probability of a different outcome. *See Grooms v. Solem*, 923 F. 2d 88 (8th Cir. 1991) (counsel rendered prejudicially deficient performance in failing to investigate and present readily available

evidence in support of defendant's alibi); *Luna v. Cambra*, 306 F. 3d 954, 962 (9th Cir. 2002) (trial counsel ineffective for failing to investigate available alibi evidence, and prejudice established when where alibi witnesses were "vague with regard to time" because alibi witnesses were nonetheless "consistent" with defendant's trial testimony); *Brown v. Myers*, 137 F. 3d 1154, 1158 (9th Cir. 1998) (same); *Parrish v. Smith*, 395 F. 3d 251 (6th Cir. 2005) (counsel rendered prejudicially deficient performance in failing to present alibi evidence). Here, it must be remembered that this Court already found on direct appeal that there was insufficient evidence to support a verdict of premeditated murder. *Mungin I, supra*. As the Supreme Court has explained, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.

With regard to the reliance on the ballistics evidence presented at trial, Mr. Mungin respectfully submits that, like trial counsel Cofer, this Court was "confused" about Mr. Mungin's alibi defense. In his first statement to police resulting from a November 21, 1991, interview with Mr. Mungin, Mr. Mungin stated he had taken a burgundy Ford Escort from a motel in Kingland, GA, at night, and had come to Jacksonville the next morning. After passing through Jacksonville, Mr. Mungin went to Monticello where he was involved in a shooting,

and then to Tallahassee where he was also involved in a shooting. Mr. Mungin then stated he returned to Jacksonville and ditched the car at 20th and Myrtle Avenue on the same day of the shooting. *Later in the statement, Mr. Mungin said he traded the gun, money, and Escort for dope which he then took back with him to Georgia on a bus.* In that first statement, Mr. Mungin said that the person he was dealing with in Jacksonville was someone named "Snow." Mr. Mungin next related that he spent several days doing drugs in Georgia, after which he was driven back to Jacksonville, where he found the Escort stripped. *He then procured another car, a Dodge, and purchased the gun back from "Snow."* Then he went to see a girl on West 28th Street and then went to Pensacola to see Charlette Dawson. He said he was in Pensacola between 7 and 8 PM on the same day, and he returned to Georgia after spending two days in Pensacola.

In his second statement to police on March 31, 1992, Mr. Mungin clarified that the person he dealt with was named "Ice," not "Snow," and that he gave the gun, car, and money to "Ice" in exchange for cocaine and indicated that he would be back. Mr. Mungin then discussed the shooting in Monticello and Tallahassee, and his uncle thereafter took him back to Georgia. Most important, in this statement, he stated "he retrieved the gun which he had loaned/sold to a black male along with the car." He said it was daytime, almost evening, when he got the

beige car, and he drive straight to Pensacola, stopping only for gas in Tallahassee. He arrived in Pensacola in the nighttime.

Thus, as explained above, Mr. Mungin had provided police with an explanation of how he had possession of the gun used to commit the Tallahassee and Monticello shootings, but that he did not have possession of the gun when the Jacksonville shooting took place. In light of his account, when considered in connection with the alibi evidence presented at the state court hearing, there is more than a reasonable probability that a jury, given the opportunity to evaluate *all* the evidence, would have found a reasonable doubt.

E. Conclusion.

In denying Mr. Mungin's 3.851 motion, the lower court, without hearing from either Mr. Brown or Judge Cofer, decided that while the new information alleged by Mr. Mungin "might have been used to impeach Kirkland's testimony, it does not create a reasonable probability of a different outcome given the importance of Kirkland's testimony compared to other trial evidence," namely the ballistics evidence (2PCR 135). However, sufficiency of the evidence is not the test for assessing the reliability of a conviction when allegations of a *Brady* or *Giglio* violation is made. In any event, the seemingly rock-solid identification given by Kirkland at trial became a feature of the State's closing argument,

notwithstanding the State's present attempt to distance itself from the importance of Kirkland's testimony to the prosecution case:

> Mr. Kirkland then told you that a few days later on September 20th, four days later, he was shown some photographs. Six or seven he described it as. And the defense tried to bring out a big thing about well, was it six, was it seven. He said either six or seven. The key thing is he signed his name on the back. This Anthony Mungin, the defendant in this case. And he picked him out of a group of six black males or seven black males. He picked out the defendant's photograph as being the person who he observed coming out of that Lil' Champ store. Identity I will submit to you is not an issue in this case as the Defense, I believe, will attempt to argue. He just didn't pick him out in this courtroom when he saw him again. He picked him out of that photograph spread four days after it happened, or three and a half days after it happened.

(R975-76). The prosecutor repeatedly referred to Kirkland's testimony, extolling his credible identification because Kirkland was "alert" and "focused" on Mr. Mungin and had "heightened perception of what was going on" much like people who remember where they were when President Kennedy was assassinated (R975). Given the importance of Kirkland's testimony, and the reliance on such by the State during closing argument, Mr. Mungin has more than established a reasonable probability of a different outcome had the jury known of the new information alleged in the present Rule 3.851 motion, the prior information gleaned from Mr. Mungin's earlier postconviction proceedings, and of course the fact that the jury was improperly instructed on premeditated first-degree murder. The singular and

combined effects of all the information not known by Mr. Mungin's jury more than undermined confidence in not only its verdict, but also its 7-5 recommendation at the penalty phase that Mr. Mungin be sentenced to death.

For the foregoing reasons, Mr. Mungin submits that the lower court order summarily denying his claims should be reversed and, at a minimum, remanded for evidentiary development.

II

THE EXISTING PROCEDURE THAT THE STATE OF FLORIDA UTILIZES FOR LETHAL INJECTION VIOLATES THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

In Claim II of his Rule 3.851 motion, Mr. Mungin alleged that the existing procedures utilized by the State of Florida for carrying out executions by lethal injection violated the Eighth Amendment to the United States Constitution (2PCR 101). As he acknowledged at the case management hearing, Mr. Mungin's counsel acknowledged that this Court has upheld the constitutionality of Florida's lethal injection procedures even after the Supreme Court decision in *Baze v. Rees*, 128 S. Ct. 1520 (2008) (T. Hearing 8/12/09 at 3-4). The lower court likewise rejected this claim, noting that this Court has rejected similar claims (2PCR 139). Mr. Mungin does raise this issue for purposes of preservation should further developments in this area arise. *See See Sireci v. State*, 773 So. 2d 34, 41 n.14 (Fla. 2000) ("we take this opportunity to suggest that issues which are being raised solely for the purposes of preserving an error should be so designated. We will consider the issues preserved for review in the event of a change in the law if counsel so indicates by grouping these claims under an appropriately entitled heading and providing a description of the substance").

CONCLUSION

The foregoing authorities, the trial record, and evidentiary hearing testimony, in conjunction with the allegations on which Mr. Mungin did not get a full and fair hearing, show that a new trial and/or resentencing are warranted Accordingly, Mr. Mungin requests that his conviction and sentence of death be vacated and/or grant any other relief which this Court may deem just and proper, including an evidentiary hearing.

CERTIFICATE OF FONT

I hereby certify that this Initial brief was typed in New Times Roman font, 14 pt. type.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief has been furnished by United States Mail, first class postage prepaid to Thomas Winokur, Assistant Attorney General, The Capitol, Tallahassee, FL, 32399-1050, this 17th day of May, 2010.

_____

TODD G. SCHER
Fla. Bar No. 0899641
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue #15-B
Miami Beach, FL 33140
(305) 861-9252 (Tel)
(305) 861-9253 (Fax)